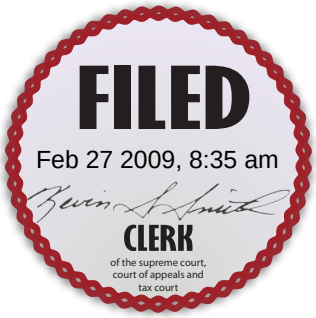

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IN THE
COURT OF APPEALS OF INDIANA

MICKEY WHITLOCK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0807-CR-403
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0305-FA-3

FEBRUARY 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

Mickey Whitlock appeals the sentence imposed after he pled guilty to burglary resulting in bodily injury, a class A felony. We affirm.

The sole issue for our review is whether the trial court erred in sentencing Whitlock.

At approximately 4:00 p.m. on May 4, 2003, forty-seven-year-old Whitlock went to the home of his grandmother, eighty-one-year-old Hazel Rousch, and step-grandfather, seventy-nine-year-old Ernest Rousch, to ask for money. Whitlock, who had recently lost his job as a Village Pantry manager, took duct tape, chains, and a knife with him to his grandparents' house. When his grandparents refused to give Whitlock money, Whitlock, who is six feet tall and weighs 210 pounds, threatened the couple with the knife, and bound them with the duct tape and chains.

Whitlock forced Ernest to write checks totaling $7,000.00. Whitlock left the bound couple in the house while he cashed the checks and used the money to buy a Cadillac. Later that evening, Whitlock returned to the house to feed the Rouschs and give them their medicine. He then bound the couple with the duct tape and chains and left them for the night.

At some point, Hazel was able to get to the phone and call the police. Lafayette Police Department officers arrived at the Rouschs' home at approximately 7:30 p.m. on May 5, more than twenty-four hours after the couple's ordeal began. One of the officers noticed that Hazel had a towel wrapped with duct tape around her wrist. Another officer

noticed that Hazel's mouth had been duct taped shut. The officers found Ernest in a bedroom. He was chained, duct-taped, and gagged. Both Hazel and Ernest had bruises on their ankles, wrists, and neck, and Ernest had some blood on his ankle where Whitlock cut him with his knife.

The Rouschs were taken to the hospital. The police officers stayed at the Rouschs' house and arrested Whitlock when he returned. Whitlock was subsequently charged with sixteen offenses, fourteen felonies and two misdemeanors. He pleaded guilty to one count of burglary resulting in bodily injury, a class A felony. During the presentence investigation report interview, Whitlock admitted that he used the following illegal substances in the past: 1) marijuana one to three times per day for sixteen years and once or twice a week for the past ten years: 2) cocaine four to five times a day for one year; 3) LSD two to three times per year for seven years; and 4) valium or methaqualone daily for five years.

At the sentencing hearing, Ernest testified that Whitlock threatened to cut Ernest's throat or kill both him and Hazel, put them in the trunk of his car and take them to Tennessee where they would never be found. Whitlock also threatened to put a candle in the living room and turn the couple's gas on. When heart patient Hazel began experiencing severe pain and Ernest begged him to dial 911, Whitlock refused and told Ernest that nobody was going in or out of the house. Hazel explained that Whitlock "is down right mean and always has been." PSI at 4.

At the close of the sentencing hearing, the trial court orally sentenced Whitlock as follows:

> The fact that you have no criminal record would in some circumstances be a mitigator however here it's clear that you have used illegal drugs on a regular basis for nearly thirty years. And as a result I find no mitigating circumstances. I do find aggravating circumstances in the victim Hazel Rousch was over the age of sixty-five at the time the crime was committed. The victim Ernest Rousch was also over the age of sixty-five. And both of them recommend aggravation of the sentence.

Tr. at 65. In the trial court's written sentencing order, the court noted two aggravating factors: the victims of the crime were over the age of 65 and both victims recommended aggravation of the sentence and no mitigating factors. The trial court sentenced Whitlock to forty years with thirty-six years executed and four years in a Tippecanoe County Correction Department Program. Whitlock appeals his sentence.

The sole issue for our review is whether the trial court erred in sentencing Whitlock. At the outset, we note that the crimes in this case occurred in 2003. It is well settled that the sentencing statute in effect at the time the crime is committed governs the sentence for the crime. *Gutermuth v. State*, 868 N.E.2d 427, 432, n. 4 (Ind. 2007). At the time of the offense in this case, the presumptive sentence for a class A felony was 30 years, with no more than 20 years added for aggravating circumstances and no more than ten years subtracted for mitigating circumstances. Tr. at 3-4. Here, the trial court ordered Whitlock to serve an enhanced forty-year sentence for one class A felony.

We further note that because the crimes in this case occurred before the 2005 amendments to the sentencing statutes were adopted, we review the sentences under the

presumptive sentencing scheme. *See Gutermuth, 868 N.E.2d at 432, n.4.* Under the presumptive sentencing scheme, sentencing determinations are within the trial court's discretion, and we will reverse only for an abuse of discretion. *Padgett v. State,* 875 N.E.2d 310, 315 (Ind. Ct. App. 2007), *trans. denied.* It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. *Id.* When the trial court does enhance a sentence, it must: 1) identify significant aggravating and mitigating circumstances; 2) state the specific reasons why each circumstance is aggravating or mitigating; and 3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. *Id.* It is generally inappropriate for us to substitute our judgment or opinions for those of the trial judge. *Id.*

Lastly, we note that a review of a sentence under the presumptive sentencing scheme implicates *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In *Blakely*, the United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase a sentence above the presumptive sentence assigned by the legislature. *Rodriguez v. State,* 868 N.E.2d 551, 556 (Ind. Ct. App. 2007). An aggravating circumstance is proper under *Blakely* when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted or stipulated by a defendant; or 4) found by a judge after the defendant consents to judicial fact finding. *Id.*

We now turn to the sentencing issues in this case. Whitlock first contends that the trial court erred in considering his substance abuse as an aggravating factor. However, our review of the trial court's written sentencing statement reveals that the court did not consider Whitlock's substance abuse to be an aggravator. Rather, the court considered Whitlock's lack of a criminal record, which would be a mitigator, to be eliminated as a mitigator because of Whitlock's substance abuse. The court considered only two aggravating factors – the age of the victims and their recommendation for Whitlock's sentence.

We further note, however, that the trial court would not have erred in considering Whitlock's twenty-six year history of illegal substance abuse to be an aggravating factor. Whitlock's failure to object or make factual changes to the presentence investigation report is tantamount to an admission of the facts contained therein. *See Chupp v. State*, 830 N.E.2d 119, 126, n. 12 (Ind. Ct. App. 2005). The trial court could therefore properly rely on the facts contained therein in sentencing Whitlock. *See id.* We find no error.

Whitlock next argues that the trial court overlooked three mitigating circumstances: 1) the offense was the result of circumstances unlikely to recur; 2) Whitlock is unlikely to reoffend; and 3) the hardship to Whitlock's family. A finding of mitigating circumstances, like sentencing decisions in general, lies within the trial court's discretion. *Wilkie v. State,* 813 N.E.2d 794, 798 (Ind. Ct. App. 2004), *trans. denied*. When a defendant alleges that the trial court failed to identify or find a mitigating circumstance, the defendant must establish that the mitigating evidence is both significant

and clearly supported by the record. *Hillenburg v. State*, 777 N.E.2d 99, 109 (Ind. Ct. App. 2002), *trans. denied*. The trial court is not required to make an affirmative finding expressly negating each potentially mitigating circumstance. *Id.*

Because Whitlock did not advance the fact that the crime was the result of circumstances unlikely to recur as a mitigating factor at the sentencing hearing, we presume that the factor is not significant, and Whitlock is precluded from advancing it as a mitigating factor for the first time on appeal. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000).

Whitlock further contends that trial court failed to consider that he was unlikely to reoffend as a mitigating circumstance. Our review of the evidence does not reveal significant evidence to support this mitigating circumstance. Rather our review of the evidence reveals that Whitlock has been regularly using illegal substances for 26 years. Because this factor was not clearly supported by the record, the trial court did not err in failing to consider it. *See Hillenburg*, 777 N.E.2d at 109.

In addition, Whitlock contends that the trial court erred in failing to consider the hardship to his wife and three teen-aged children as a mitigating factor. Many people convicted of serious crimes have one or more children, and absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship. *Ware v. State*, 816 N.E.2d 1167, 1178 (Ind. Ct. App. 2004). Indeed, these mitigators can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *Weaver v.*

State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), *trans. denied*. Here, Whitlock does not explain and points to no evidence that the enhanced sentence would impose any more hardship on his teen-aged children than a shorter sentence. We therefore find no error.

Lastly, Whitlock argues that his sentence is inappropriate. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(b).

Here, with regard to the character of the offender, Whitlock, the father of three teenaged children, has been regularly using illegal substances for more than twenty-six years. With regard to the nature of the offense, Whitlock went to the home of his 81-year-old grandmother and 79-year-old step grandfather with duct tape, chains, and a knife. When his grandparents refused to give him any money, Whitlock bound and gagged them with duct tape and chains. He also threatened to kill them, and when his grandmother began to experience chest pains, Whitlock refused to allow anyone to call 911. Whitlock forced his step-grandfather to write checks totaling $7,000.00 and went out and bought a Cadillac. Based upon our review of the evidence, we see nothing in the character of this offender or in the nature of this offense that would suggest that Whitlock's sentence is inappropriate.

Affirmed.

DARDEN, J., and CRONE, J., concur.